IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-772

DALY AND OTHERS,
Petitioners,

v.

NATURAL RESOURCES BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF OF RESPONDENT IN OPPOSITION

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December 5, 1973

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JURISDICTION

The petition herein erroneously asserts that this Court has jurisdiction under 28 U.S.C. §1257 (3). There is no jurisdiction in this Court to review the judgment of the Wisconsin Supreme Court because the questions presented in the petition were neither raised in nor decided by the Wisconsin Supreme Court and, further, the only questions raised by the petitioners in the Wisconsin Supreme Court and decided by it were exclusively questions of state law.

STATEMENT OF THE CASE

On March 11, 1969, and under the provisions of sec. 31.05, Wis. Stats., Lakes of the Menominees, a copartnership or joint venture, filed an application with the Wisconsin Department of Natural Resources for a permit to construct, operate, and maintain a dam in the Linzy Creek outlet of Pywaosit Lake in Menominee County, Wisconsin (App. 2, 18, 54).

After notice, a hearing was held on the application before hearing examiners of the Wisconsin Department of Natural Resources (App. 2, 19, 54-59). At the hearing several persons appeared, were heard, and were recorded as being in favor of the granting of the application, and a great number appeared or were represented and were recorded as being in opposition to the granting of the application (App. 2, 19, 54-59). The petitioners herein, who are enrolled members of the Menominee Tribe of American Indians, appeared at the hearing in opposition to the granting of the permit (App. 19).

On September 14, 1970, the Department of Natural Resources issued the permit to construct the dam (App. 2, 18, 64).

The petitioners thereafter filed a petition for judicial review under ch. 227, Wis. Stats., in the Circuit Court of Dane County, Wisconsin (App. 1, 19). The Dane County Circuit Court affirmed the order granting the dam permit in question (App. 1, 52, 53). Its memorandum opinion is Appendix B to this petition (App. 18-51). The circuit court rejected the petitioners' claims in respect to the here involved dam permit and decided that the administrative hearing was not a "contested case" within the meaning of

sec. 227.01, Wis. Stats. (App. 23); that even if it was a "contested case" the due process "fair-play" provisions of ch. 227, Wis. Stats., had been met (App. 23, 24); that the notice provisions of sec. 31.06 (2), Wis. Stats., had been complied with (App. 24); and that the findings of fact and order of the Department of Natural Resources were supported by "substantial evidence in view of the record as a whole." (App. 24-50).

The petitioners, then, appealed to the Wisconsin Supreme Court from the judgment of the Dane County Circuit Court (App. 1).

Contrary to the assertions contained in the petitioners' "Statement of the Case" herein, no federal question or questions were raised by the petitioners in the Wisconsin Supreme Court. The *only* questions raised by them in the Wisconsin Supreme Court were questions of state law. These questions were described by that court as follows:

> "The appellants contend (1) that the proceeding before the DNR was a contested case [within the definition of sec. 227.01, Stats.] and not a legislative hearing, (2) that due process 'fair-play' requirements of ch. 227, Stats., for a contested case were not complied with, (3) that the notice requirements of sec. 31.06 (2) were not complied with, and (4) that findings of fact of the DNR were not supported by 'substantial evidence in view of the record as a whole.' " (App. 3.)*

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*This description of the questions is an accurate one. The "Questions Involved" as set forth in the petitioners' brief to the Wisconsin Supreme Court are stated by them to be:

"1. Was this a 'contested case' within the definition contained in Sec. 227.01 (2), Wisconsin Statutes?"

"2. Assuming that this was a 'contested case,' were the Chapter 227, Wisconsin Statutes, due process standards met?"

"3. Was the independent statutory due process requirement of individual notice, which is set forth in Sec. 31.06 (2), Wisconsin Statutes, met?"

"4. Were the findings of fact and order of the DNR supported by 'substantial evidence in view of the record as a whole?' "

The Wisconsin Supreme Court, which affirmed the judgment of the circuit court, decided only the above questions of state law and did *not* decide any federal question, including those set forth in this petition as the "Questions Presented" (App. 1-17).

ARGUMENT

This Court Has No Jurisdiction To Review The Judgment Of The Wisconsin Supreme Court Herein.

A. The questions presented in this petition were neither raised in nor decided by the Wisconsin Supreme Court.

The jurisdiction of this Court to review on certiorari the final judgments or decrees of state courts is set forth in 28 U.S.C. §1257 (3). Such jurisdiction exists *only* when a federal question has been presented to and decided by the highest court of the state and its decision of the federal question was necessary in its determination of the cause. In *Durley v. Mayo* (1956), 351 U.S. 277, 281, 76 S.Ct. 806, 100 L.Ed. 1178, 1183, this Court wrote:

> " 'It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. Honeyman v Hanan, 300 US 14, 18; Lynch v New York, 293 US 52. * * *' "

A more recent case in which a writ of certiorari was dismissed for want of jurisdiction because of a failure to

raise the federal question in the highest state court is *Cardinale v. Louisiana* (1969), 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed. 2d 398. This Court, in dismissing the writ, wrote (394 U.S. 437, 438):

> "Although certiorari was granted to consider this question [admissibility of a confession], the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. *It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions.* In Crowell v Randell, 10 Pet 368, 9 L Ed 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v Norwood's Lessee, 5 Cranch 344, 3 L Ed 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c 20, §25, 1 Stat 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet 368, 391, 9 L Ed 458, 467. *The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion,* Miller v Nicholls, 4 Wheat 311, 315, 4 L Ed 578, 579 (1819), *and since,* e.g. Safeway Stores, Inc. v Oklahoma Retail Grocers Assn., Inc., 360 US 334, 342, n. 7, 3 L Ed 2d 1280, 1286, 79 S Ct 1196 (1959); State Farm Mutual Automobile Ins. Co. v Duel, 324 US 154, 160-163, 89 L Ed 812, 817-819, 65 S Ct 573 (1945); McGoldrick v Compagnie Generale Transatlantique, 309 US 430, 434-435, 84 L Ed 849, 851-852, 60 S Ct 670 (1940); Whitney v California, 274 US 357, 362-363, 71 L Ed 1095, 1100-1101, 47 S Ct 641 (1927); Dewey v Des Moines, 173 US 193, 197-201, 43 L Ed 665, 667-668, 19 S Ct 379 (1899); Murdock v City of Memphis, 20 Wall 590, 22 L Ed 429 (1875)." (Emphasis added.)

See also the still more recent cases of *Hill v. California* (1971), 401 U.S. 797, 805, 806, 91 S.Ct. 1106, 28 L.Ed. 2d 484, 490, 491; *Monks v. New Jersey* (1970), 398 U.S. 71, 90 S.Ct. 1563, 26 L.Ed. 2d 54; and *DeBacker v. Brainard* (1969), 396 U.S. 28, 90 S.Ct. 163, 24 L.Ed. 2d 148.

As revealed by the opinion of the Wisconsin Supreme Court herein, 60 Wis. 2d 208, 208 N.W. 2d 839, and Appendix A to this petition, neither of the questions presented by this petition was raised in nor decided by the Wisconsin Supreme Court.

B. The only questions raised by the petitioners in and decided by the Wisconsin Supreme Court were questions of state law, which this court has no jurisdiction to review.

The questions presented by the petitioners to the Wisconsin Supreme Court and decided by it in *Daly and others v. Natural Resources Board* (1973), 60 Wis. 2d 208, 208 N.W. 2d 839, were exclusively questions of state law. As set forth by that court:

> "The appellants contend (1) that the proceeding before the DNR was a contested case and not a legislative hearing, (2) that due process 'fair-play' requirements of ch. 227, Stats., for a contested case were not complied with, (3) that the notice requirements of sec. 31.06 (2) were not complied with, and (4) that findings of fact of the DNR were not supported by 'substantial evidence in view of the record as a whole.' " (App. 3 or 60 Wis. 2d at 212.)

The Wisconsin Supreme Court decided that the administrative proceeding was a "contested case" within the meaning of ch. 227, Wis. Stats. (App. 10); that the due process

"fair-play" requirements of ch. 227, Wis. Stats., did apply and had been complied with therein (App. 10); that the notice requirements of sec. 31.06 (2), Wis. Stats., had been met (App. 10, 11), and that the findings of fact of the Department of Natural Resources were supported by "substantial evidence in view of the record as a whole" (App. 12-17). Absolutely no federal question was raised in or decided by the Wisconsin Supreme Court in this case.

Questions of state law are not reviewable by this Court on a petition for certiorari to review a judgment of the highest court of a state. This fact was pointed out by Justice Brandeis in *Brinkerhoff-Faris Trust & Sav. Co. v. Hill* (1930), 281 U.S. 673, 680, 50 S.Ct. 451, 74 L.Ed. 1107, wherein he wrote:

> "It is true that *the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state;* that *this court's power to review decisions of state courts is limited to their decisions on federal questions;* and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court." (Emphasis added.)

See also *Henry v. Mississippi* (1965), 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed. 2d 408; *Herb v. Pitcairn* (1945), 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789; *United Gas Public Service Co. v. Texas* (1938), 303 U.S. 123, 58 S.Ct. 483, 82 L.Ed. 702, and many others.

CONCLUSION

For the above reasons this Court has no jurisdiction to review the judgment of the Wisconsin Supreme Court herein and the petition for certiorari must be denied.

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